

Mark Kennedy (Bar No. 493380)
5100 Wisconsin Avenue, NW, Suite 400
Washington, DC 20016
(202) 527-7315

Attorney for Plaintiff,
PHYSICIANS COMMITTEE
FOR RESPONSIBLE MEDICINE

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PHYSICIANS COMMITTEE FOR
RESPONSIBLE MEDICINE,
5100 Wisconsin Avenue, NW, Suite 400,
Washington, DC 20016,

Plaintiff

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE,
Rm. 3071-S, Stop 0201
1400 Independence Avenue, SW
Washington, DC 20250-0201,

Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF

This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and implementing regulations, seeking injunctive relief ordering Defendant United States Department of Agriculture (“USDA”) to provide records requested by the Physicians Committee for Responsible Medicine (“Physicians Committee”).

JURISDICTION AND VENUE

1. Pursuant to 5 U.S.C. § 552(a)(6)(C), Physicians Committee has exhausted administrative remedies. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. This Court has the authority to grant declaratory relief pursuant to 28 U.S.C. § 2201 and the authority to award costs and attorney fees under 5 U.S.C. § 552(a)(4)(E). Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

2. Plaintiff Physicians Committee is a nonprofit public health advocacy organization, founded in 1985 and organized under section 501(c)(3) of the Internal Revenue Code. On behalf of its membership of 150,000 physicians and laypersons, Physicians Committee advocates for preventive medicine through proper nutrition and encourages higher standards for ethics in medical research.

3. Defendant USDA is a United States agency of which the Agricultural Marketing Service (“AMS”) is a component. The Agricultural Marketing Service administers USDA’s mandatory commodity promotion and research programs, also known as “checkoff” programs. See, e.g., 7 U.S.C. §§ 7411–7425. USDA and the Agricultural Marketing Service are agencies within the meaning of 5 U.S.C. § 552(f)(1).

STATEMENT OF FACTS

Federal Checkoff Programs

4. Congress has authorized and delegated to USDA the creation of nationwide programs dedicated to “research and promotion” of specific agricultural commodities. See, e.g., 7 U.S.C. §§ 7411–7425. These programs are known as checkoff programs, a term that arose nearly a century ago when commodity producers literally checked a box on a pre-printed form to participate in voluntary promotions of their choice.

5. Federal checkoff programs obtain their funding from government-mandated assessments—or taxes—imposed on all of the producers in the regulated industry. See 7 U.S.C. § 7416. As with any other tax, payment is mandatory, regardless of whether the producer agrees with the content of the advertising. See generally *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 477 (1997).

6. USDA oversees and controls the federal checkoff programs. USDA creates and appoints a commodity-specific board of directors to carry out the activities of each program. 7 U.S.C. § 7414. USDA approves each checkoff’s annual budget. 7 U.S.C. § 7414(e)(2); USDA, Guidelines for AMS Oversight of Commodity Research and Promotion Programs § II (2012), <http://www.unitedsoybean.org/wp-content/uploads/AMS-RP-Guidelines-June-2012.pdf> (“Guidelines for AMS Oversight”). USDA approves all major contracts involving checkoff funds, and these contracts become effective only upon USDA’s approval. 7 U.S.C. § 7414(f); 7 U.S.C. § 4504(f) (for dairy); Guidelines for AMS Oversight § IV(A)(2), (B)–(D). USDA reviews all plans and projects of each checkoff and approves only those that comply with applicable checkoff legislation. 7 U.S.C. § 7414(e)(1); Guidelines for AMS Oversight §§ V(C), IX(B). USDA approves all checkoff advertising and is responsible for reviewing and verifying all

nutritional claims and their supporting data. 7 U.S.C. § 7414(d)(3); Guidelines for AMS Oversight § IX(B)–(D).

7. Congress authorized the dairy checkoff in 1983. 7 U.S.C. §§ 4501–4538. USDA thereafter established the National Dairy Promotion and Research Board (“Dairy Board”) to carry out the dairy checkoff. 7 U.S.C. § 4504(b); 7 C.F.R. § 1150.131. In 1995, the Dairy Board joined with a dairy industry association to create Dairy Management Inc., a District of Columbia corporation that administers the dairy checkoff on behalf of the Dairy Board. USDA, Report to Congress on the National Dairy Promotion and Research Program and the National Fluid Milk Processor Promotion Program 3–4 (2011), <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5100700> (“Report to Congress”).

8. Despite the existence of the dairy checkoff to promote all dairy products in general, Congress later authorized the fluid milk checkoff, and USDA established the corresponding Fluid Milk Board, to promote fluid milk products specifically. 7 U.S.C. §§ 6401–6417. Given the overlapping goals of the dairy checkoff and fluid milk checkoff, USDA annually submits to Congress a single report summarizing the activities of the two programs. See Report to Congress, supra, at 1.

9. Congress authorized the beef checkoff in 1985. 7 U.S.C. §§ 2901–2918. USDA thereafter established the Cattlemen’s Beef Promotion and Research Board (“Beef Board”) to carry out the beef checkoff. See 7 U.S.C. § 2904; 7 C.F.R. §§ 1260.141–1260.151.

10. USDA also oversees checkoff programs for eggs, 7 U.S.C. §§ 2701–2718, pork, 7 U.S.C. §§ 4801–4819, and lamb, 7 C.F.R. §§ 1280.101–1280.634.

Physicians Committee’s Monitoring of Federal Nutrition Policies

11. Physicians Committee has a long history of monitoring the federal government’s nutrition policies, often employing open government laws to do so.

12. In 1999, Physicians Committee sued the secretaries of Defendant USDA and the Department of Health and Human Services over improprieties in the appointment and operation of the joint Dietary Guidelines Advisory Committee. Physicians Comm. for Responsible Med. v. Glickman, 117 F. Supp. 2d 1, 2–3 (D.D.C. 2000). In that case, this Court held that the agencies violated the Federal Advisory Committee Act by failing to disclose committee records in a timely manner, see id. at 6–7, 14–15, and that USDA violated the FOIA by invoking exemption (b)(6) to withhold financial conflicts of interest among committee members, see id. at 11–14.

13. Physicians Committee began monitoring USDA’s checkoff programs around 2001. That year Physicians Committee submitted to USDA a FOIA request for records, from 1995 through 2000, regarding the dairy checkoff’s research and promotion, including partnerships with restaurant chains, of cheese as well as financial relationships between nongovernmental organizations and the Dairy Board or the Fluid Milk Board. In its response, which USDA assigned the identifier AMS FOIA 169-01, USDA provided in their entirety more than two dozen letters, contracts, marketing presentations, and memoranda that included references to expenditures, commercial obligations, activities, and goals undertaken by Dairy Management Inc., contractors, and other parties to implement the dairy checkoff and fluid milk checkoff programs.

14. In 2002, Physicians Committee submitted to USDA FOIA requests for records, from 1985 through the dates of the requests, regarding beef checkoff and pork checkoff activities, including partnerships with “high volume chain restaurants.” USDA assigned its responses the identifiers AMS FOIA 56-03 and AMS FOIA 57-03.

15. In 2007, Physicians Committee submitted to USDA a FOIA request for records, from January 1, 2002, through the date of the request, regarding dairy checkoff and fluid milk

activities, including partnerships with “retail fast food restaurant chains.” USDA assigned its response the identifier AMS FOIA 17-08.

16. In May 2007, the Federal Trade Commission acted on a Petition to Prohibit False and Misleading Advertising submitted by Physicians Committee, seeking an end to a massive nationwide advertising campaign launched jointly by the dairy checkoff and fluid milk checkoff. The advertisements, which USDA had approved, claimed that consuming three servings of dairy products per day would lead to weight loss. The multi-million dollar campaign included national and regional print, television, and internet advertising directed towards consumers, trade professionals, and health professionals. Noting the lack of “conclusive evidence” to support the USDA-approved claims, the Federal Trade Commission announced that the dairy checkoff and fluid milk checkoff would “discontinue all advertising and other marketing activities involving weight loss claims.”

17. Physicians Committee’s successful petition has received intense media coverage since 2007, including a 2010 front page article in the New York Times regarding “inherent conflicts in the Agriculture Department’s historical roles as both marketer of agriculture products and America’s nutrition police.” See Michael Moss, While Warning About Fat, U.S. Pushes Cheese Sales, New York Times, Nov. 7, 2010, at A1, <http://www.nytimes.com/2010/11/07/us/07fat.html?pagewanted=all>.

18. The New York Times article cited dairy checkoff “contract records released through the Freedom of Information Act” and highlighted the dairy checkoff’s partnerships with restaurants to create new menu items, one of which “has more than three-quarters of the daily recommended level of saturated fat and sodium.” Id. Another dairy checkoff partnership involved a “\$12 million marketing effort” on behalf of Domino’s Pizza. Id. The internet version of the article linked to scans of USDA records obtained by Physicians Committee via the

aforementioned 2001 FOIA request and to records included as part of Physicians Committee's Petition to Prohibit False and Misleading Advertising. See Documents on Marketing Cheese, New York Times, Nov. 6, 2010, <http://documents.nytimes.com/documents-on-marketing-cheese>.

19. After being contacted during the development of the New York Times article, Physicians Committee began taking steps to update its data on USDA's checkoff programs.

Facts Specific to Claim 1

20. By letter dated September 15, 2010, Physicians Committee submitted to USDA a FOIA request for records, from January 1, 2007, through the date of the request, regarding communications, contracts, and presentations regarding the dairy checkoff program and fast food corporations as well as communications, contracts, and presentations regarding the beef checkoff program and supermarkets or beef product manufacturers.

21. USDA assigned this request the identifier AMS FOIA 125-10 and began providing responses in batches.

22. By letter dated March 24, 2011, USDA provided "Batch 3," in which USDA invoked exemption (b)(4) to partially withhold from 46 pages "[d]etailed commercial data (such as market research, methodologies, and other proprietary information)."

23. By letter also dated March 24, 2011, USDA provided "Batch 4," in which USDA invoked exemption (b)(4) to entirely withhold 79 pages and to partially withhold 3 pages due to "[d]etailed commercial data (such as market research, methodologies, and other proprietary information)."

24. By letter dated April 19, 2011, USDA provided "Batch 5," in which USDA invoked exemption (b)(4) to entirely withhold 87 pages and to partially withhold 4 pages. USDA invoked exemption (b)(4) and another exemption together to partially withhold 1 page due to

“[d]etailed commercial data (such as market research, methodologies, and other proprietary information).”

25. Prior to the 2010 New York Times article, USDA routinely provided, in response to the FOIA requests identified above, letters, contracts, marketing presentations, and memoranda that included references to expenditures, commercial obligations, activities, and goals undertaken by Dairy Management Inc., contractors, and other parties to implement the checkoff programs. After the 2010 New York Times article, USDA began invoking exemption (b)(4) to withhold this same information from the public.

26. USDA’s unwarranted invocations of exemption (b)(4) are counter to the FOIA and counter to President Obama’s Memorandum for the Heads of Executive Departments and Agencies regarding the FOIA. See 74 Fed. Reg. 4683 (Jan. 21, 2009). As the President said in the Memorandum, “All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.” Id. Importantly in this case, “The Government should not keep information confidential merely because public officials might be embarrassed by disclosure.”

27. By letter dated April 21, 2011, Physicians Committee appealed USDA’s invocation of exemption (b)(4) in Batch 3, Batch 4, and Batch 5.

28. Physicians Committee argued that it was improper for USDA to invoke the (b)(4) exemption with respect to expenditures, program obligations, activities, and goals undertaken by Dairy Management Inc. to implement the dairy checkoff. Physicians Committee argued that such information is neither “obtained from a person” nor “confidential” because Dairy Management Inc. is a government-created corporation funded by government-mandated assessments and overseen by USDA’s Agricultural Marketing Service, a government agency.

29. Physicians Committee further argued that it was improper for USDA to invoke the (b)(4) exemption with respect to expenditures, program obligations, activities, and goals undertaken by contractors to implement the dairy checkoff because such information is not “confidential.” As demonstrated in the records provided by USDA, Physicians Committee argued, Dairy Management Inc. uses dairy checkoff funds to promote new products sold by trendsetting contractors, such as new meal options sold by fast food restaurants. The stated justification for these promotional partnerships is that one contractor’s success with the new products will inspire the contractor’s competitors to sell the very same products themselves. Dairy Management Inc. repeatedly publicly announces partnerships with contractors in its periodic news releases. These publicly available news releases disclose financial details, and Dairy Management Inc. discloses even more information about its contractors’ activities on its public web site. Because this information is widely and intentionally available already, no harm could befall the contractors from further disclosure.

30. By letter dated March 12, 2012, USDA upheld its invocation of the (b)(4) exemption and denied Physicians Committee’s appeal.

31. Physicians Committee now seeks judicial review of USDA’s invocation of the (b)(4) exemption in Batch 3, Batch 4, and Batch 5 of AMS FOIA 125-10:

AMS FOIA 125-10					
Batch	Date	Pages Withheld Under (b)(4)		Pages Withheld Under (b)(4) and Other Exemption(s)	
		entirely	in part	entirely	in part
3	Mar. 24, 2011		46		
4	Mar. 24, 2011	79	3		
5	Apr. 19, 2011	87	4		1

Facts Specific to Claim 2

32. After denying Physicians Committee's appeal regarding Batch 3, Batch 4, and Batch 5, USDA resumed its response to Physicians Committee's request.

33. By letter dated September 26, 2012, USDA provided "Batch 6," in which USDA invoked exemption (b)(4) to entirely withhold 2,186 pages and to partially withhold 182 pages. USDA invoked exemption (b)(4) and another exemption together to partially withhold 39 pages. USDA stated that it invoked exemption (b)(4) due to "[d]etailed commercial data (such as market research, methodologies, retail food company sales data, marketing strategies, and other proprietary information)." USDA stated that Batch 6 was its "final response."

34. By letter dated October 31, 2012, Physicians Committee appealed USDA's invocation of exemption (b)(4) in Batch 6:

AMS FOIA 125-10					
Batch	Date	Pages Withheld Under (b)(4)		Pages Withheld Under (b)(4) and Other Exemption(s)	
		entirely	in part	entirely	in part
6	Sept. 26, 2012	2,186	182		39

35. USDA has not acknowledged or responded to Physicians Committee's appeal.

36. Physicians Committee did not receive a timely response to its administrative appeal, as provided for in 5 U.S.C. § 552(a)(6)(A)(ii).

37. Physicians Committee has exhausted its administrative remedies. See 5 U.S.C. § 552(a)(6)(C)(i).

Facts Specific to Claim 3

38. By letter dated January 25, 2012, Physicians Committee submitted to USDA a FOIA request for 21 categories of records, from January 1, 1997, through the date of fulfillment of the request, documenting the relationship between the beef checkoff program and various committees and researchers from the American Academy of Pediatrics.

39. USDA assigned this request the identifier 2012-AMS-01325-F.

40. By letter dated July 20, 2012, USDA provided a “final response” stating that “no records responsive to your request were located.”

41. By letter dated July 30, 2012, Physicians Committee appealed USDA’s response as inadequate. Physicians Committee noted that at least two responsive records were then available on the beef checkoff’s own public web sites and should have been—yet were not—located and provided by USDA.

42. By letter dated August 8, 2012, USDA acknowledged Physicians Committee’s appeal and assigned it the identifier 2012-AMS-00142-A.

43. On October 11, 2012, counsel for Physicians Committee met by telephone with William D. Allen IV, Deputy Director of Legislative & Regulatory Review Staff, and Jennifer Porter, Associate Deputy Administrator, both of USDA’s Agricultural Marketing Service.

44. USDA asserted in this meeting that USDA possessed no responsive records and that the Beef Board, which oversees the beef checkoff, would search for responsive records.

45. USDA further stated that the Beef Board performs its work through contractors and that the largest contract is with the National Cattlemen’s Beef Association (“NCBA”), a major industry association that carries out beef checkoff activities, including those covered by Physicians Committee’s FOIA request. USDA stated that USDA and the Beef Board intentionally do not maintain copies of records related to NCBA’s beef checkoff activities and

that USDA and the Beef Board instead rely on NCBA to maintain such records. USDA asserted that Physicians Committee was not entitled to beef checkoff records maintained by NCBA.

46. By email message dated October 23, 2012, USDA provided three records responsive to Physicians Committee's request and "ask[ed] that you consider withdrawing your appeal as we have provided the requested documents."

47. By email message dated October 24, 2012, Physicians Committee refused to withdraw its appeal, stating as follows:

When we spoke by phone on October 11, USDA informed us that NCBA maintains the records that P[hysicians Committee] requested. As you know, these records relate to research funded by the Beef Checkoff to assist in the Beef Checkoff's promotion of beef.

USDA stated that NCBA is the Beef Board's largest contractor for carrying out Beef Checkoff campaigns, a proposition about which NCBA's web site and several other sources, including USDA documents, seem to agree. USDA also said that the Beef Board maintains very few records regarding its campaigns and relies on NCBA to maintain records related to the campaigns that NCBA carries out for the Beef Board.

Under the circumstances, P[hysicians Committee] believes that NCBA's files constitute records under the FOIA's definition of "record" at 5 U.S.C. § 552(f)(2):

2) "record" and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

48. USDA has not further responded or provided a final response to Physicians Committee's appeal.

49. Physicians Committee did not receive a timely response to its administrative appeal, as provided for in 5 U.S.C. § 552(a)(6)(A)(ii).

50. Physicians Committee has exhausted its administrative remedies. See 5 U.S.C. § 552(a)(6)(C)(i).

PLAINTIFF'S CLAIMS FOR RELIEF

CLAIM 1

(Denial of access to records in AMS FOIA 125-10)

51. Physicians Committee realleges and incorporates by reference paragraphs 1 through 50.

52. Physicians Committee properly requested dairy checkoff and beef checkoff records within USDA's control in request AMS FOIA 125-10.

53. Physicians Committee is entitled by law to receive the requested records.

54. Physicians Committee has wrongfully invoked exemption (b)(4) to withhold the requested records.

55. Therefore, USDA violated the FOIA by failing to provide all non-exempt records, or portions thereof, requested by Physicians Committee.

CLAIM 2

(Failure to timely respond to appeal regarding AMS FOIA 125-10)

56. Physicians Committee realleges and incorporates by reference paragraphs 1 through 50.

57. Physicians Committee properly appealed the denial of its request for dairy checkoff and beef checkoff records in Batch 6 of USDA's response to request AMS FOIA 125-10.

58. USDA was required to respond to Physicians Committee's appeal within 20 working days. 5 U.S.C. § 552(a)(6)(A)(ii).

59. FOIA provides that "[a]ny person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the

agency fails to comply with the applicable time limit provisions of this paragraph.” 5 U.S.C. § 552(a)(6)(C)(i).

60. USDA failed to respond to Physicians Committee’s appeal within 20 working days and did not provide written notice of an extension of the statutory time limit.

61. Therefore, USDA violated FOIA by not timely responding to Physicians Committee’s appeal.

CLAIM 3
(Failure to timely respond to appeal 2012-AMS-00142-A)

62. Physicians Committee realleges and incorporates by reference paragraphs 1 through 50.

63. Physicians Committee properly appealed the denial of its request for beef checkoff records within USDA’s control.

64. USDA was required to respond to Physicians Committee’s appeal, which USDA assigned the identifier 2012-AMS-00142-A, within 20 working days. 5 U.S.C. § 552(a)(6)(A)(ii).

65. FOIA provides that “[a]ny person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.” 5 U.S.C. § 552(a)(6)(C)(i).

66. USDA failed to respond to Physicians Committee’s appeal within 20 working days and did not provide written notice of an extension of the statutory time limit.

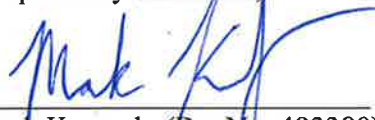
67. Therefore, USDA violated FOIA by not timely responding to Physicians Committee’s appeal.

RELIEF REQUESTED

WHEREFORE, Physicians Committee respectfully requests that this Court:

- A. order USDA to produce all records responsive to request AMS FOIA 125-10 but withheld by USDA under FOIA exemption (b)(4);
- B. order USDA to grant Physicians Committee's FOIA appeal regarding Batch 6 of AMS FOIA 125-10;
- C. order USDA to grant FOIA appeal 2012-AMS-00142-A;
- D. order USDA to search for and produce all responsive records covered by request 2012-AMS-01325-F (and appeal 2012-AMS-00142-A), including beef checkoff records maintained, at USDA's request, by NCBA;
- E. award Physicians Committee its reasonable attorney fees and litigation costs incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- F. grant such other relief as the Court may deem just and proper.

Respectfully submitted,



Mark Kennedy (Bar No. 493380)

PHYSICIANS COMMITTEE FOR
RESPONSIBLE MEDICINE

5100 Wisconsin Avenue, NW, Suite 400

Washington, DC 20016

(202) 527-7315

Attorney for Plaintiff

Dated: April 10, 2013